CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 135. 1900, 31.

WILSON BROTHERS, A CORPORATION, AND JACOB KAHN, HENRY KAHN, JACOB WOHLBACH, COPARTNERS UNDER THE NAME OF KAHN BROTHERS & COMPANY, AND A. W. BECKER, HARRY L. MAYER, JOSEPH MAYER, AND HENRY B. MAYER, COPARTNERS UNDER THE FIRM NAME OF BECKER, MAYER & COMPANY, APPELLANTS,

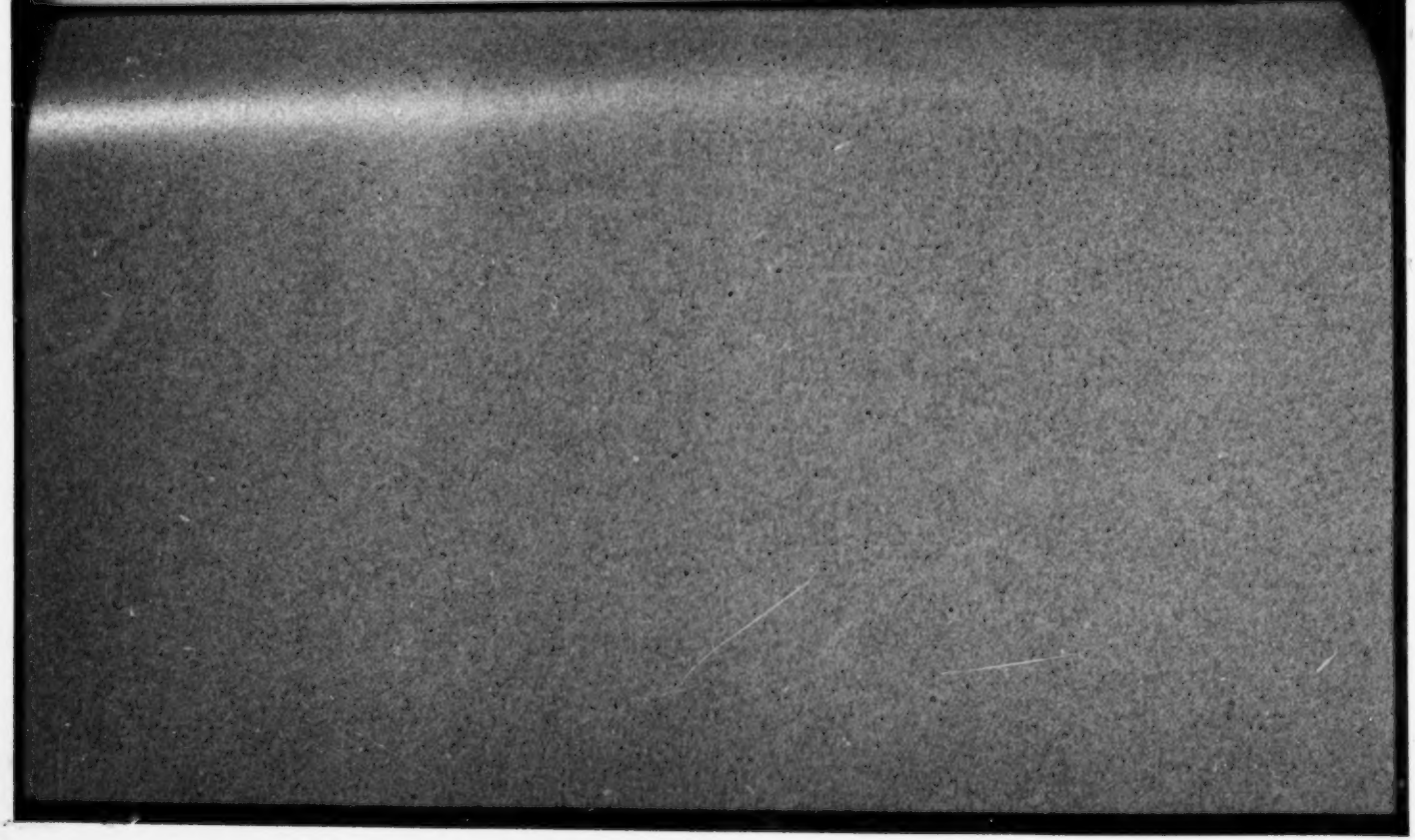
vs.

CASSIUS B. NELSON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED FEBRUARY 21, 1900.

(17,649.)



(17,649.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 535.

WILSON BROTHERS, A CORPORATION, AND JACOB KAHN, HENRY KAHN, JACOB WOHLBACH, COPARTNERS UNDER THE NAME OF KAHN BROTHERS & COMPANY, AND A. W. BECKER, HARRY L. MAYER, JOSEPH MAYER, AND HENRY B. MAYER, COPARTNERS UNDER THE FIRM NAME OF BECKER, MAYER & COMPANY, APPELLANTS,

vs.

CASSIUS B. NELSON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 23, 1900.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1898.

WILSON BROTHERS, a Corporation, and JACOB KAHN, Henry Kahn, Jacob Wohlbach, Copartners under the Name of Kahn Brothers & Company, and A. W. Becker, Harry L. Mayer, Joseph Mayer, and Henry B. Mayer, Copartners under the Firm Name of Becker, Mayer & Company, Appellants,
vs.
CASSIUS B. NELSON, Appellee.
} No. 617.

In the matter of Cassius B. Nelson, alleged bankrupt.

Mr. D. K. Tenney, Mr. F. W. Hall, Mr. John D. Erdall, Mr. Sam. Swanson, counsel for appellants.
Mr. William F. Vilas, Mr. Rob't M. Bashford, counsel for appellee.

Appeal from the district court of the United States for the western district of Wisconsin.

Transcript of record filed July 6, 1899.

Filed Aug. 28, 1899.

EDWARD M. HOLLOWAY, *Clerk.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1899, January Session, 1900.

In the Matter of CASSIUS B. NELSON, Bankrupt. No. 617, Original. In Bankruptcy.

In this case, duly argued and submitted to this court, there arise questions of law concerning which this court desires the instruction and advice of the Supreme Court of the United States.

On February 5, 1885, Cassius B. Nelson executed and delivered to Sarah Johnstone his promissory note in writing for the sum of $3,960, payable "five years or before after date," with interest, at the rate of four per cent. per annum, until paid. To this note was attached an irrevocable power of attorney, duly executed by the said Nelson under his hand and seal in the usual form, authorizing any attorney of any court of record in his name to confess judgment thereon after maturity of the note. This note was given for so much money at the time loaned to Nelson, and the interest on the note was paid from time to time up to the 1st day of November, 1898. Nelson was a trader and entered into business as such at the city of Madison, Wisconsin, soon after the giving of the note and carried on such business until his stock in trade was levied upon by the sheriff under execution as hereinafter stated. On the 1st day of November, 1898, Nelson, as he well knew, was and had long been insolvent, and thereafter continued

to be and is now insolvent, his liabilities largely exceeding his assets.

On November 21, 1898, Sarah Johnstone caused judgment to be duly entered in the circuit court of the State of Wisconsin for the county of Dane against said Nelson upon the note and warrant of attorney aforesaid for the sum of $8,975, damages and costs, being the face of the note and $15 costs. Upon that judgment execution was immediately thereafter issued out of the court to the sheriff of that county, who thereunder and by authority thereof on the same day levied upon the stock and goods of Nelson, and thereafter and on the 15th day of December, 1898, sold the same at public auction and applied the proceeds thereof, to wit, the sum of $4,400, upon and in part payment of the judgment so rendered. This proceeding left the said Nelson without means to meet any other of his obligations. The judgment was so entered and the levy made without the procurement of Nelson and without his knowledge or consent. Such judgment was not subject to attack by Nelson and could not have been vacated or discharged by any legal proceedings which might have been instituted by him in that behalf, nor could the levy under the execution issued upon such judgment have been set aside or vacated by Nelson except by his filing his voluntary petition in bankruptcy prior to the sale and obtaining an
4 adjudication of bankruptcy thereunder, or by payment of the judgment. On the 10th day of December, 1898, creditors of the said Nelson of the requisite number and holding debts against him to the requisite amount filed their petition against the said Nelson in the district court of the United States for the western district of Wisconsin, sitting in bankruptcy, to procure an adjudication against him as a bankrupt. The act of bankruptcy therein alleged was in substance that while insolvent he suffered and permitted the said Sarah Johnstone, one of his creditors, to obtain preference upon his property through legal proceedings by the entry of the said judgment and the levy thereunder upon his stock of goods, and failed to vacate or discharge the preference obtained through such legal proceedings at least five days before the sale of the property under such judgment and execution. Upon issue joined the district court ruled that the said Nelson had not, by reason of the premises, committed an act of bankruptcy, and this ruling is before us for review.

The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

1. Whether the said Cassius B. Nelson, by failure to file his voluntary petition in bankruptcy before the sale under such levy, and to procure thereon an adjudication of bankruptcy, or by his failure to pay and discharge the judgment before the sale under such levy, committed an act of bankruptcy within the meaning of sec. 3*a*, subdivision (3), of the bankrupt act, 30 Stat., chap. 541.

2. Whether the judgment so entered and the levy of the execution thereon was a preference "suffered" or "permitted" by
5 the said Nelson within the meaning of clause (3) of sec. 3*a* of the bankrupt law.

3. Whether the failure of Nelson to vacate and discharg the preference so obtained, if it was one, at least five days before the execution sale, was an act of bankruptcy.

These questions the court on this day orders certified and submitted to the Supreme Court of the United States for its proper decision.

WM. A. WOODS.
JAS. G. JENKINS.
P. S. GROSSCUP.

February 10, 1900.

Endorsed on cover: File No., 17,649. U. S. C. C. of appeals, 7th circuit. Term No., 535. Wilson Brothers, a corporation, & Jacob Kahn, Henry Kahn, Jacob Wohlbach, copartners under the name of Kahn Brothers & Company, & A. W. Becker, Harry L. Mayer, Joseph Mayer, & Henry B. Mayer, copartners under the firm name of Becker, Mayer & Company, appellants, *vs.* Cassius B. Nelson. Filed February 21, 1900. (Certificate.)